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No. 00-957

In the
SUPREME COURT OF THE UNITED STATES

In the matter of the Care and Treatment of
Michael T. Crane,
State of Kansas,

Petitioner,

v.

Michael T. Crane,

Respondent.

Brief of the States of Missouri, Alabama, Florida Maryland, Massachusetts, Nebraska, North Dakota, Oklahoma and South Carolina In Support of Writ of Certiorari to the Supreme Court of Kansas

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QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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INTEREST OF AMICUS CURIAE

This case addresses a key question with regard to the scope and constitutionality of a statute that "unambiguously requires a finding of dangerousness either to oneself or to others." *Kansas v. Hendricks*, 521 U.S. 246, 357 (1997). Directly or indirectly, it affects all fifty states.

Some amici are attorneys general in states that have laws addressing the treatment of sexually violent predators that are similar to the Kansas statute upheld in *Hendricks* and at issue here. Each uses those laws to ensure both public protection and personal treatment by placing the sexually violent predator in a secure mental health facility for treatment. He remains there until his condition is sufficiently controlled that he is no longer likely to commit violent sexual acts. Though the laws do not all precisely parallel the one at issue in this case, they all contain language that can raise the issue that was decided by the Kansas Supreme Court as a matter of federal, not state constitutional law. In fact, many of these states are now facing claims by alleged sexually violent predators based on the holding in this case. In the absence of a finding that they *can*not control their actions (instead of merely *will* not or *find it difficult to* control them), alleged predators argue that they cannot constitutionally be compelled to engage in the treatment that the sexually violent predator laws require.

All amici are attorneys general in states to which sexually violent predators could, if prematurely released, relocate without the treatment that laws such as the one at issue were designed to ensure. State lines do not limit a predator's ability to offend again. The situation of Crane, who is likely to commit future acts of sexual violence (Petitioner's Appendix ("Pet. App.") at 3a, 25a), demonstrates the seriousness of the problem. Crane can easily cross the street between Kansas City, Kansas, and Kansas City, Missouri, or travel Interstate 35 south into Oklahoma before he offends again. The attorneys general represent the public's concern with the threat posed by Crane and others who, despite some ability to control their behavior, will continue to pose a threat to public safety if they are released without successful treatment.

REASONS FOR GRANTING THE WRIT

In *Kansas v. Hendricks*, this Court upheld the Kansas statute providing for the treatment of sexually violent predators in secure facilities – thus ensuring both protection of the public and proper treatment of the predator. The Kansas Supreme Court's decision at issue here, particularly when contrasted with decisions in other states, creates a significant problem with regard to the interpretation and enforcement of those laws. If the Kansas court is right, then there are persons in custodial treatment in other states who have been detained on an unconstitutional premise. If the Kansas court is wrong, then persons have been released in Kansas who are likely to commit future violent sexual offenses, and who merit treatment under the law upheld in *Hendricks*. Leaving either condition in place awaiting the unlikely uniform resolution of the conflict in state or lower federal courts is inherently unfair to those whose liberty or whose safety is erroneously threatened.

The Kansas Supreme Court is not the first to delve into the realms of volitional impairment. Indeed, the question of whether the states' laws addressing custodial treatment of sexually violent predators must require a finding of volitional impairment has been posed elsewhere – and has been answered in ways that cannot be reconciled with the one given here by the Kansas Supreme Court.[1] Those differences cannot be explained by differences in statutory language, nor by reference to this Court's existing precedents.

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[1] *See, e.g., In re Linehan*, 594 N.W.2d 867, 875-76 (Minn. 1999), *cert. denied sub nom. Linehan v. Minnesota*, 120 S.Ct. 587 (1999); *In re Brooks*, 973 P.2d 486, 492 (Wash. App. 1999); *In re Varner*, 734 N.E.2d 226, 235-36 (Ill. App. 2000); *People v. Hatfield*, 80 Cal. Rptr. 268, 282 (Cal. App. 1998).

Even the Kansas Supreme Court recognized that the answer to the volitional impairment question is not found in the statutes. The Kansas law contains no requirement of proof of volitional capacity. *See* Petitioner's Appendix at 9a. The same is true of other predator laws, which often share Kansas's extension of treatment to those whose "mental abnormalities" are conditions that affect "*emotional or* volitional capacity." *E.g.*, Mo. Rev. Stat. § 632.480(2) (2000); Cal. Welf. & Inst. Code § 6600, subd. (c) (2000). Statutory construction is thus unavailable to restrict the laws' coverage to those with deficient volitional capacity, for to do so would render the "emotional" option meaningless. The Kansas court instead based its holding on its reading of federal constitutional law.

That holding is neither found in nor compelled by any prior decision of this Court. The Kansas court cited this Court's opinions in *Hendrick* to support its conclusion. But the holding in that case is not on point. Its impact on the question posed here is, at most, ambiguous. Though another case currently before this Court, *Selig v. Young*, No. 99-1185 (argued Oct. 31, 2000), also addresses sexually violent predator statutes, it, too, does so in a context that avoids resolution of the issue the Kansas decision raises.

Only this Court can definitively resolve both the ambiguity made evident by the Kansas court's reading of *Hendricks* and the conflict that the Kansas decision creates. Only this Court can give state judges the guidance that they require as they make critical decisions affecting both individual liberty and public safety. And only this Court can give alleged predators sure knowledge of the scope of their constitutional rights. Until this court speaks, judges throughout the country will continue to reach inconsistent conclusions as to a constitutional question. Alleged predators and potential victims will continue to benefit or suffer from that inconsistency.

Certainly the question will not go away on its own. It has been raised or can be expected to be raised shortly in every one of the sixteen states with laws regarding involuntary treatment of sexually violent predators. Answering it will be particularly problematic in states that have short deadlines. For example, in many states, a trial judge is required to quickly decide whether there is probable cause to believe that the person is a sexually violent predator – a mandate for speed intended to protect the alleged predator from unnecessary confinement. Judges in those states must make that probable cause decision within 72 hours of detention.[2] At that point, the judge either places the person in custody for evaluation, or releases him. The state's legal or practical ability to appeal or to detain the person pending appeal may be problematic.[3] Once the person is released, it may be impossible or impractical to return him to custody – at least before he is found having committed another offense. On the other hand, a person's liberty is already being taken even during the examination period. Our aversion to improper detention, the public pressure for protection against the threat of sexual violence, and short deadlines combine to make clear legal rules essential.

Despite the need for clear and consistent rules, under most circumstances the amici would be quite willing to wait

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[2] *See* Mo. Rev. Stat. § 632.489.2 (2000); Ariz. Rev. State. § 36-3705(D) (2000); 725 Ill. Comp. Stat. § 207/30(b) (2000); Iowa Code § 229A.5.2 (1999); Kansas Stat. Ann. § 59-29a05(b) (1999); N.D. Cent. Code § 25-03.3-11 (2000); S.C. Code Ann. § 44-48-80 (1999); Wash. Rev. Code § 71.09.04(2) (2000); Wis. Stat. § 980.04(2) (1999).

[3] *See In re Care and Treatment of Salcedo*, 2001 Mo. App. LEXIS 11 (Mo. Ct. App. S.D. 2001), in which the court held that there is not appeal at the probable cause stage.

and litigate that issue in their own courts – hoping, in their role as protectors of public safety, for a conclusion contrary to that reached in Kansas. But the high stakes on both sides ensure that the dispute will be raised forcefully and repeatedly. And the conflict among the courts ensures that even now there is someone who has been either confined or released based on an erroneous rule. To the amici, leaving that situation unresolved any longer than necessary is intolerable.

CONCLUSION

For the reasons stated above, the Court should grant the petition and consider whether the states' "sexually violent predator" laws must be limited to instances where the state proves that alleged predator cannot, rather than merely will not, refrain from committing violent sexual offenses.

Respectfully submitted,

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